PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001
(202) 588-1000

BRIAN WOLFMAN
(202) 588-1000 EXT. 7730
E-MAIL: BWOLFMAN@CITIZEN.ORG

August 2, 2001

Hon. Anthony J. Scirica
Chair, Standing Committee on Rules
of Practice and Procedure
Room 22614, United States Courthouse
601 Market Street
Philadelphia PA 19106

Hon. William L. Garwood
Chair, Advisory Committee on
Appellate Rules
Room 399, United States Courthouse
903 San Jacinto Boulevard
Austin TX 78701

Re: Proposed Amendment to Modify "Naming" Requirement of FRAP 3(c)

Dear Judges Scirica and Garwood:

I am writing you in your respective capacities as Chairs of the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Appellate Rules to propose an amendment to Federal Rule of Appellate Procedure 3(c)(4). The proposed amendment attached to this letter would modify the "naming" requirement of Rule 3(c)(1) to provide that when appellate jurisdiction is proper in only one court, an appeal will not be dismissed because the notice of appeal does not explicitly name the court to which the appeal is taken. This change would prevent appellants from losing their appeals on the basis of inconsequential errors that prejudice no one.

Rule 3(c)(1) states that "[t]he notice of appeal must . . . (C) name the court to which the appeal is taken." Strict application of this rule could cause appeals to be lost where there is no countervailing benefit in enforcing the rule. Our proposal is consistent with Rule 4(d) and 28 U.S.C. § 1631, both which are intended to preserve appeals where there is little or no countervailing benefit in strict application of the Rule.

1. **Rule 4(d).** Where a party files a notice of appeal in the court of appeals, rather than in the district court, the appeal will not be dismissed for lack of jurisdiction. Although Rule 3(a)(1) states that the notice of appeal is to be filed in the district court, Rule 4(d) provides that if a party files a notice of appeal in the court of appeals, the court of appeals must deliver the notice to the district court, and the filing date is deemed to be the date the notice was filed with the court of appeals.

2. **28 U.S.C. § 1631.** A party who errs not only by filing a notice of appeal in an appellate court, but who also files in the wrong circuit still will not have her claim dismissed for want of jurisdiction. 28 U.S.C. § 1631 provides that when the court finds that it lacks jurisdiction over an appeal, it may, in the interest of justice, transfer the appeal to the court that does have jurisdiction. As under Rule 4(d), section 1631 provides that the appeal will then proceed as if it had been filed on the date of the erroneous filing.

In contrast to the liberal treatment afforded appellants in the above examples, a party who makes the more benign error of neglecting to name the court to which she is appealing could have the appeal dismissed for lack of jurisdiction under a strict reading of Rule 3(c)(1)(C), even though, in almost all cases, there is only one

court to which the appeal may be taken. No court of appeals currently reads Rule 3(c)(1)(C) to bar appeals when the notice of appeals does not name the court to which the appeal was taken. *See, e.g., Ortiz v. John Butler Co.*, 94 F.3d 1121 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997); *McLemore v. Landry*, 898 F.2d 996 (5th Cir. 1990). However, that has not always been the case. In *United States v. Webb*, 157 F.3d 451 (6th Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999), the Sixth Circuit held that it lacked jurisdiction to hear a criminal appeal because the notice failed to name the appellate court, and it dismissed the appeal despite acknowledging an absence of prejudice to the government. *Id.* at 453. Later, in a split decision, the en banc Sixth Circuit overruled *Webb*. *See Dillon v. United States*, 184 F.3d 556, 557 (6th Cir. 1999) (en banc) ("where only one avenue of appeal exists, Rule 3(c)(1)(C) is satisfied even if the notice of appeal does not name the appellate court").

Despite the current unanimity of authority, I believe that the Rule should be modified to ensure that the *Webb* approach is not followed in the future (as the en banc dissenters in *Dillon* thought appropriate). Four considerations underscore the need for a Rule change at this time.

First, based on our experience, the potential for unfairness to appellants is significant. I represented Mr. Webb in his effort to obtain Supreme Court review

and thus had occasion to witness *Webb*'s effect in the Sixth Circuit. After *Webb*, the Sixth Circuit dismissed several appeals for failure to name the Sixth Circuit in the notice of appeal prior to granting rehearing en banc in *Dillon*. In *Dillon*, I represented two amici whose Sixth Circuit appeal had been held in abeyance pending the outcome in *Dillon*. At that time, I was informed that a large number of appeals were on hold awaiting the outcome. (The lawyer for the United States in *Dillon* believed the figure was approximately 150). Thus, despite the ease of naming the court of appeals in the notice, it is obvious that many appellants fail to do so and that, therefore, an amendment to Rule 3 would avoid considerable potential hardship.

Second, the Supreme Court's recent decision in *Becker v. Montgomery*, 121 S. Ct. 1801 (2001), may cause confusion for courts construing Rule 3(c)(1)(C). On the one hand, *Becker* noted that "opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Id.* at 1808. At the same time, however, the Court reaffirmed that "Appellate Rules 3 and 4 are jurisdictional in nature," *id.* at 1806 (internal quotation marks omitted), and quoted without comment Rule 3(c)(1)(C)'s requirement that a notice of appeal "must . . . name the court to which the appeal is taken." *Id.* at 1807.

Third, as far as I can tell, amending the rule as suggested will not prejudice

anyone. In the vast majority of all appeals, the court to which an appeal must be taken is the circuit court that geographically comprises the district court from which the appeal arose. There are, of course, a small number of civil cases in which an appeal goes to a specialized national court — such as the Federal Circuit — but in those cases the parties and the court are generally aware of the proper appellate venue. Indeed, the participants' understanding of the proper appellate court is so ingrained that in all the "naming" cases of which I am aware, the parties apparently did not notice the purported jurisdictional defect. Rather, the notice of appeal was filed and the case was sent "upstairs" to the appropriate appellate court for briefing on the merits, with the Rule 3(c) issue being raised sua sponte by the court of appeals. *See, e.g., Webb*, 157 F.3d at 452. In any event, an appellant cannot gain an advantage by omitting the name of the court to which she is appealing. *Cf. Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988). In short, there is no downside to the proposed amendment.

Fourth, and finally, I note that the Department of Justice agrees in substance with our position (although I do not know its position on a Rule change). The position of the government is important, not only because it is a frequent litigant, but because it appears that this issue has arisen most often in the criminal context (as in *Webb* and *Dillon*), where the government is always a party. In *Dillon*, after

consultation with the Solicitor General's Office, the Department of Justice argued to the en banc Sixth Circuit that the failure to name the appellate court in the notice of appeal did *not* divest an appellate court of jurisdiction. (The Sixth Circuit appointed an amicus to defend the *Webb* rationale). The government's position forcefully underscores that appellees will not be prejudiced by the proposed rule change.

In sum, Rule 3(c)(4) should be amended to clarify that a notice of appeal need not name the court to which the appeal is taken when only one court is available for the appeal. That amendment would place an appellant who files a timely notice of appeal, but neglects to name the court to which she is appealing, on equal footing with an appellant who complies with the naming requirement but files the notice of appeal in the wrong court or in the wrong circuit altogether.

Thank you for considering this request. If you have any questions or concerns, please contact me at the phone number or e-mail address listed above.

Sincerely,

Brian Wolfman

cc: Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure

Theodore B. Olson
Solicitor General

PROPOSED AMENDED RULE 3(c)(4)
(new language italicized)

(c) Contents of the Notice of Appeal

* * *

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice, *or for failure to name the court to which the appeal is taken if there is only one court that has appellate jurisdiction.*

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

April 11, 2002

Brian Wolfman, Esquire
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001

Dear Mr. Wolfman:

I am writing to advise you that your proposal to amend Appellate Rule 3(c) is on the agenda of the Advisory Committee on Appellate Rules for its April 22-23, 2002, meeting. The meeting will be in Washington, D.C. and is open to the public.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

May 24, 2002

Brian Wolfman, Esq.
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009-1001

RE: Action taken by the Advisory Committee on Appellate Rules

Dear Mr. Wolfman:

Thank you again for your proposed amendment to Rule 3(c) of the Federal Rules of Criminal Procedure. Your proposal was considered by the Advisory Committee on Appellate Rules at its April 22-23, 2002, meeting in Washington, D.C.

After some discussion and deliberation, the Committee declined to adopt your proposal. The Committee observed that the circuits that have addressed the issue continue to be unanimous that dismissal of an appeal is not necessary under these circumstances. And several members concurred that, in the wake of the Supreme Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001), it is extremely unlikely that a future circuit split will develop. The Supreme Court specifically stated in *Becker* that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, *to which appellate court*." *Id.* at 1808 (emphasis added). Consequently, the Committee concluded that Rule 3(c) did not need to be amended at this time.

Thank you again for your time and interest in the federal rulemaking process.

Sincerely,

Peter G. McCabe
Secretary